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SUMMARY OF ARGUMENT.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933.

THE METROPOLITAN CASUALTY INSURANCE COMPANY OF NEW YORK,
Petitioner,
v.
KENNETH V. BROWNELL, AS RECEIVER OF THE PEOPLES NATIONAL BANK AND TRUST COMPANY,
Respondent.

No. 962.

BRIEF OF RESPONDENT.

ARGUMENT.

I.

The only question presented for the consideration of this Court is whether the provisions of Burns' Indiana Revised Statutes, 1926, Sec. 9139 (Acts 1865, p. 105), which provides in part that:

> "No condition or agreement not to sue for a period of less than three years shall be valid, * * *"

is a valid restriction upon all foreign insurance companies admitted to transact business in the State of Indiana.

It is the position of respondent that under this statute the provision in the fidelity bond issued by petitioner limiting the time within which suit could be brought thereunder to fifteen months is invalid, and that the action filed thirty-three months after loss was discovered could be maintained.

The Statute of Limitations of Indiana covering the bringing of actions on written contracts for the payment of money, which was enacted in 1881, being Burns' Indiana Revised Statutes, 1926, Sec. 302, provides in part as follows:

> "The following actions shall be commenced within the periods herein prescribed after the cause of action has accrued and not afterward:
>
> * * * * * *
>
> "Fifth: Upon promissory notes, bills of exchange, and all other written contracts for the payment of money hereafter executed, within ten years: * * *"

1. The rules of law governing the construction of and the right to recover under insurance contracts measures the rights under fidelity bonds executed for a money consideration.

> *American Surety Co. v. Pangburn*, 182 Ind. 116, 119;
> *Fidelity, etc., Co. v. Blount Plow Works*, 78 Ind. App. 529, 533;
> *National Surety Co. v. Rochester Bridge Co.*, 83 Ind. 195, 198;

Title Guaranty, etc., Co. v. State ex rel., 61 Ind. App. 268, 280.

2. Conditions in policies of insurance that actions must be brought thereon in less than three years are void.

Insurance Co. v. Brim, 111 Ind. 281, 287;
Caywood v. Supreme Lodge, 171 Ind. 410, 412;
New York Life Ins. Co. v. Lahr, 192 Ind. 613, 631;
Rutherford v. Prudential Ins. Co., 34 Ind. App. 531, 539;
Phoenix A. & S. B. Assn. v. Lathrop, 41 Ind. App. 141, 145.

In the foregoing cases this statute has been applied and in each instance the upper courts of Indiana have declared that a provision in an insurance policy limiting the time for bringing suit to less than three years is void. The leading case is the first cited, *Insurance Co. v. Brim*, 111 Ind. 281. On page 287, in commenting on the validity of this statute, the Indiana Supreme Court said:

> "The statute already referred to enacts that any condition or agreement in a policy of foreign insurance, 'not to sue for a period of less than three years,' shall be void, and it also provides that any condition inserted in a policy to avoid the provisions of that section shall be void. It is at once obvious that the condition in the policy and the provisions of the statute can not stand together. It is said the provision in the policy, the practical effect of which was to bar a right of action after one year, was such a contract as the parties had the right to make,

and that such right was not subject to legislative control.

"While the general proposition may be conceded, that insurance companies have the right to contract that parties shall assert their claims against them within a reasonable time (*Riddlesbarger v. Hartford Ins. Co.*, 7 Wall. 386), yet the constitutional right of the Legislature to prescribe the terms upon which foreign corporations may transact business within the State is also abundantly established. *Farmers, etc., Ins. Co. v. Harrah*, 47 Ind. 236; *Bank of Augusta v. Earle*, 13 Pet. 519; *Paul v. Virginia*, 8 Wall. 168; *Ducat v. Chicago*, 10 Wall. 410; *Cooper Man'f'g Co. v. Ferguson*, 113 U. S. 727; *Cincinnati Mutual, etc., Co. v. Rosenthal*, 55 Ill. 85; *Thorne v. Travellers Ins. Co.*, 80 Pa. St. 15.

"The statute must be regarded as a legislative declaration, that less than three years is an unreasonable limit within which to require parties holding claims under a policy of foreign insurance to assert their claims or be forever barred. This statute was in force when the contract of insurance was consummated, and it must be conclusively presumed that the contract was made with a due regard for the law. In so far as the statute and the condition in the policy are in conflict, the statute must prevail. It is said the statute is unconstitutional. Counsel have not called our attention to any provision of the Constitution which is supposed to be infringed, and we know of none."

In addition thereto, in the case of *Rutherford v. Prudential Ins. Co.*, 34 Ind. App. 531, 539, the Court said:

"The condition that 'no suit on this policy shall be maintained against the company unless

> brought within six months next after the date of the death of the insured' is in conflict with the provisions of the statute that 'no condition or agreement not to sue for a period of less than three years shall be valid.' "

In *Phoenix Accident, etc., Assn. v. Lathrop*, 41 Ind. App. 141, 145, the Court said:

> "The second paragraph of answer set up that the cause of action did not accrue within six months preceding the action. There was a clause in the policy thus limiting the right to sue. Such limitation is void."

In *New York Life Ins. Co. v. Lahr*, 192 Ind. 613, 631, the Court said:

> "The provision in the policy that no suit shall be brought on the policy after one year from the time of the accruing of the cause of action is void under the statute."

In *Caywood v. Supreme Lodge*, 171 Ind. 410, 412, the Court said:

> "It is settled by the great weight of authorities that a provision in an insurance policy limiting the time in which suit may be brought thereon to a period less than that fixed by statute of limitations is binding, unless it contravenes a statute."

While the Indiana decisions are not controlling in the United States Courts, in the event the statute actually contravenes the Constitution of the United States, the foregoing decisions do show that this statute has been applied and has been upheld for many years in Indiana. The decision of the Circuit Court

of Appeals in affirming the judgment of the Court below is not in conflict with the weight of authority nor with the decisions of this Court.

II.

Indiana is not alone in having enacted legislation of this nature. Numerous other states have similar statutes in force, the validity of which have been upheld in the following cases:

Erickson v. Order of United Commercial Travelers, (Kan.) 176 Pac. 989;

Cortessi v. Firemen's Fund Ins. Co., 5 Ohio App. 109;

Schlitz v. Lowell Mut. Fire Ins. Co., (Vt.) 119 Atl. 516;

Stuyvesant Ins. Co. v. A. C. Smith Co., (Miss.) 99 So. 575;

Galliher v. State, etc., Ins. Co., (Ala.) 43 So. 833;

Smith & Marsh v. Northern, etc., Fire Assn., (Va.) 70 S. E. 482, 38 L. R. A. (N. S.) 1016;

Massachusetts Benefit Life Assn. v. Hale, (Ga.) 23 S. E. 845;

Vesey v. Commercial Union, etc., Co., (S. D.) 101 N. W. 1074;

German Ins. Co. v. Luckett, Texas Civil Appeals, 34 S. W. 173.

III.

The State of Indiana had the power to determine and specify the conditions under which foreign insurance companies should be permitted to transact busi-

ness within its borders. It had the power to exclude petitioner from doing business within the state, and to determine under what conditions it could transact business and execute contracts, provided that it did not deprive such a corporation of rights conferred by the Constitution and laws of the United States.

Phoenix Ins. Co. v. McMaster, 237 U. S. 63, 71;
Security Mutual v. Prewitt, 202 U. S. 246;
St. Clair v. Cox, 106 U. S. 350;
Munday v. Wisconsin Trust Co., 252 U. S. 499;
Paul v. Virginia, 8 Wall. 168, 181.

In discussing this question in the case last above cited, Mr. Justice Fields said, at page 181:

> "Having no absolute right of recognition in other States, but depending for such recognition and the enforcement of its contracts upon their assent, it follows as a matter of course that such assent may be granted upon such terms and conditions as those States may think proper to impose. They may exclude the foreign corporation entirely; they may restrict its business to particular localities; or they may exact such security for the performance of its contract with their citizens as in their judgment will best promote the public interest. The whole matter rests in their discretion."

Also in the case of *Phoenix Ins. Co. v. McMaster*, 237 U. S. 63, 71, Mr. Justice Day said:

> "Furthermore, the Phoenix Company is a foreign corporation whose license to do business in the State of South Carolina would expire

upon the first of April, 1912, and, therefore, it was within the power of the State, so long as it did not impose upon the Company as a condition of doing business within the State any deprivation of rights secured to it under the Federal Constitution, to determine for itself the conditions upon which such foreign corporation could do business within the State. This principle has been often affirmed by the decisions of this Court, and the Insurance Company being within that class of companies not doing an interstate business, *the State might, in the exercise of its lawful authority, exclude it from doing business within the State so long as no rights conferred by the Constitution and laws of the United States were destroyed or abridged.* See *Harrison v. St. Louis & San Francisco R. R.*, 232 U. S. 318, 332, and the cases in this Court therein cited." (Our italics.)

The State of Indiana, therefore, clearly had the right to regulate and control the manner in which petitioner transacted business in the state. It is to be noted that no contention is made that petitioner was discriminated against to its detriment in favor of other foreign insurance companies. In fact the statute involved herein applied alike to all such companies.

IV.

Petitioner has not been deprived of equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States, nor has it been deprived of any rights guaranteed under said Constitution nor under any law of the United States.

As has frequently been defined by this Court, equal protection of the laws means subjection to equal laws

applying alike to all in the same situation. It has been always held that states have the right to classify the subjects of legislation and make differences in regulations where substantial differences of condition exist.

Phoenix Ins. Co. v. McMaster, 237 U. S. 63, 67;
Fort Smith Light Co. v. The Paving District, 274 U. S. 387, 391;
Power Mfg. Co. v. Saunders, 274 U. S. 490, 493;
Truax v. Corrigan, 257 U. S. 312, 337;
Gulf, etc., Ry. Co. v. Ellis, 165 U. S. 150, 155;
Lindsley v. Natl. Carbonic Gas Co., 220 U. S. 61, 78.

The petitioner failed to point out to the trial court or to the Circuit Court of Appeals wherein its situation was not substantially different from that of a domestic corporation organized under the laws of the State of Indiana. It merely asked the Court, without any foundation of law or fact, to hold that there was not a substantial difference, and that by reason of such fact the Indiana statute should be declared void. This statute was enacted in 1865, by the General Assembly of the State of Indiana, pursuant to its power to classify and prescribe the different conditions under which foreign insurance companies can transact business. For approximately sixty-seven years before the filing of this action, every foreign insurance company has conducted its business in said state under the provisions of this statute.

Regulatory statutes are not discriminatory when all within a given class are treated on the same basis.

Whether such regulations require adjustment or modification because of changed conditions lies within the province of the law-making bodies and not the courts.

In the case of *Phoenix Ins. Co. v. McMaster*, 237 U. S. 63, 72, in discussing this subject Mr. Justice Day said:

> "The equal protection of the laws, as this court has frequently decided, means subjection to equal laws applying alike to all in the same situation; or as expressed by Mr. Justice Field, speaking for this court in *Barbier v. Connolly*, 113 U. S. 27, 31,—a case much relied upon by the plaintiffs in error,—equal protection of laws means 'that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances, in the enjoyment of their personal and civil rights. . . . That no greater burdens should be laid upon any one than are laid upon others in the same calling and condition.' In this general definition, the court recognizes, as it always has, that what the equal protection of the law requires is equality of burdens upon those in like situation or condition. It has always been held consistent with this general requirement to permit the States to classify the subjects of legislation, and make differences of regulation where substantial differences of condition exist."

In the light of the foregoing rule, the Statute under consideration clearly is not discriminatory.

V.

The restrictions imposed by this statute are not in any way in interference with interstate commerce, as the issuance of the policy of insurance is not a trans-

action of commerce, nor is an insurance contract an article of commerce, but merely a contract of indemnity.

Paul v. Virginia, 8 Wall. 168, 183;
New York Life Ins. Co. v. Deer Lodge County, 231 U. S. 495, 502;
Natl., etc., Ins. Co. v. Wanberg, 260 U. S. 71, 75;
Hooper v. California, 155 U. S. 648.

VI.

The classification made by the General Assembly of Indiana in passing this statute is not open to objection, as it does not preclude the assumption that such classification was made in the exercise of legislative judgment and discretion. It cannot be said that in enacting said statute the Legislature failed to exercise its judgment and discretion within proper bounds.

Stebbins v. Riley, 268 U. S. 137, 143;
Swiss Oil Corp. v. Shanks, 273 U. S. 407, 413.

Petitioner complains of the opinion of the Circuit Court of Appeals on the ground that the Court failed to point out wherein this statute was not a discrimination or wherein a substantial difference existed. It would seem rather that the burden was upon petitioner to show wherein there was a discrimination and that a substantial difference did not exist. This it wholly failed to do. No evidence was introduced in the lower court to prove such fact, nor was anything presented to justify petitioner's position.

The Legislature well might have considered the differences in the transaction of business with foreign

and domestic insurance companies. It may have considered the necessity of communicating with officials and officers outside of the state in the settlement of claims, and may have felt that in order to protect the rights of the citizens of Indiana a claimant should have at least three years within which to bring an action under an insurance contract. Such consideration would be most reasonable and proper.

While it is not involved in this case, there is a statute in force in the State of Indiana, being Burns' Indiana Revised Statutes, 1926, Sec. 9037, which imposes the same condition on policies issued by domestic life insurance companies. This statute is mentioned merely for the purpose of showing that the Legislature did have some valid and good reason for this limitation. The mere fact that all companies which might be regulated in a similar manner were not included does not render invalid regulation of all those in the same class.

VII.

No facts are disclosed by the record which would justify the Court in holding that the action of the Indiana General Assembly was arbitrary or unreasonable. In the absence of such showing the Court would not be justified in overruling the decisions of the Supreme and Appellate Courts of that state.

Fort Smith Light Co. v. The Paving District, 274 U. S. 387, 391;

Public Service Co. v. Durham, 261 U. S. 149, 154;

Middleton v. Texas Power & Light Co., 249 U. S. 152, 158;

Swiss Oil Corp. v. Shanks, 273 U. S. 407;
Erb v. Morasch, 177 U. S. 584, 586.

In a number of decisions this Court has refused to assume that substantial differences in condition do not exist in the absence of proof of such fact. Before petitioner is entitled to judgment that the regulation complained of was not based on a valid distinction it had the burden of showing that such distinction did not exist and that because thereof the statute was arbitrary or unreasonable.

This proposition was discussed in the case of *Fort Smith Light Co. v. The Paving District*, 274 U. S. 387. On page 391 Mr. Justice Stone said:

> "Nor need we cite authority for the proposition that the Fourteenth Amendment does not require the uniform application of legislation to objects that are different, where those differences may be made the rational basis of legislative discrimination. There is nothing in the record now before us to show that there is any similarity of plaintiff's road to others in the state with respect to many considerations which might reasonably determine which roads should be required to do street paving. Differences in location, use and physical character of the streets, the extent to which paving has been completed and local methods of assessing benefits for street paving, are some of the considerations which might reasonably move the legislature to require street paving of one road or several and not of others. Cf. *Metropolitan Street Ry. v. New York*, 199 U. S. 1, 46, 47; *N. Y., N. H. & H. R. R. v. New York*, 165 U. S. 628; *Erb v. Morasch*, 177 U. S. 584, 586; *Savannah, Thunderbolt Ry. v. Savannah*, 198 U. S. 392. We may not assume in the absence of proof that

such differences do not exist. *Erb v. Morasch, supra; Middleton v. Texas Power & Light Co.*, 249 U. S. 152, 158; *Swiss Oil Corp. v. Shanks*, 273 U. S. 407.

"There are no facts disclosed by the record which would enable us to say that the legislative action with which we are here concerned was necessarily arbitrary or unreasonable or justify us in overruling the judgment of the state court that it was reasonable. *Public Service Co. v. Durham, supra*, 154."

In the case of *Middleton v. Texas Power & Light Co.*, 249 U. S. 152, this Court had under consideration the Texas Workmen's Compensation Act, which exempted certain classes of employees from its scope. The contention was made that by reason of this fact the act was discriminatory. In discussing the question as to how courts should approach the question of determining whether or not a statute is unconstitutional, this Court said, on page 157:

"There is a strong presumption that a legislature understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience, and that its discriminations are based upon adequate grounds. The equal protection clause does not require that state laws shall cover the entire field or proper legislation in a single enactment. If one entertained the view that the act might as well have been extended to other classes of employment, this would not amount to a constitutional objection. (Citing cases.)

"The burden being upon him who attacks a law for unconstitutionality, the courts need not be ingenious in searching for grounds of dis-

> tinction to sustain a classification that may be subjected to criticism."

In the case of *Erb v. Morasch*, 177 U. S. 584, this Court considered the validity of an ordinance enacted in Kansas City, Kansas, regulating the operation of street railroads. One of such railroads was excepted from its provisions. The claim was made that because of such fact the ordinance was unconstitutional. In discussing its duty in construing this ordinance in the absence of any proof this Court said, on page 586:

> "With the presumption always in favor of the validity of legislation, state or municipal, if the ordinance stood by itself the courts would be compelled to presume that different circumstances surrounding the tracks of respective railroads were such as to justify a different rule in respect to the speed of their trains."

In that case, however, evidence was introduced and it was shown that the railway was properly excepted from the provisions of the ordinance.

CONCLUSION.

The petitioner throughout the course of this litigation has based its case principally on *Power Mfg. Co. v. Saunders*, 274 U. S. 490, wherein this Court held an Arkansas statute invalid. The facts in that case were entirely different from those in this action, in that the right to file transitory actions against foreign companies in any county in the state as against the right to file actions against domestic corporations in the county wherein it had an agent or place of business was involved. In that case the general rule was stated by Mr. Justice VanDevanter, on page 39;

> "It (the Fourteenth Amendment) does not prevent a state from adjusting its legislation to differences in situation or forbid classification in that connection; but it does require that the classification be not arbitrary, but based on a real and substantial difference having a reasonable relation to the subject of the particular legislation."

The Legislature of Indiana has indicated, by enacting the statute involved herein, that there is a substantial difference between domestic and foreign insurance companies. In this action this statute stands alone. Later a statute was enacted providing that a clause in an insurance policy issued by a domestic company limiting the right to bring an action within three years is void. Such act clearly indicates that in the opinion of the Legislature the welfare of the people of this state demanded that the time for bring an action be not limited to less than three years. Such a regulation certainly cannot be classified as arbitrary and not founded on sound judgment.

There has been no showing that petitioner was in any way harmed by the statute, that by reason thereof was in any wise precluded from making a proper defense to this action, or that the so-called discrimination deprived it of the equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States.

In petitioner's brief is quoted certain language of the Circuit Court of Appeals stating that it evidently was not the intention of the Legislature when the act was passed to nullify the Fourteenth Amendment for the reason that such amendment was not in effect. The opinion further states that it was evident that the Legislature was attempting to establish a public policy for the State of Indiana. These observations in no wise affect the soundness of the opinion, as this Court will readily see, and are not subject to criticism on the part of petitioner.

The petitioner has failed to show wherein the Circuit Court of Appeals has decided an important question of local law in conflict with local decisions, or has failed to point out any important question of Federal law which should be decided by this Court.

In view of all the foregoing the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

SIDNEY S. MILLER,
CHARLES D. HUNT,
Attorneys for Respondent.

SAMUEL D. MILLER,
GEORGE R. JEFFREY,
Of Counsel.